(2)

No. 85-6389

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1985 TERM

DONALD DUFOUR *

Petitioner *

v. *

STATE OF MISSISSIPPI *

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF MISSISSIPPI

Bernard S. Grimm
500 Indiana Avenue, N.W.
WAshington, D.C. 20001
202-628-1200

Robert E. Morin
Suite 201
419 Seventh Street, N.W.
Washington, D.C. 20004
202-638-6700

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Whether a state may reject a claim that an indigent capital defendant was a denied effective assistance of counsel because of counsel's failure to retain an psychiatrist or psychologist to present mitigating evidence at the sentencing phase of the trial because the petitioner has failed to prove that he was "prejudiced", when at the same time the state court denies the indigent capital defendant the funds to retain a psychologist or psychiatrist for the purpose of proving such a claim?

2. What, if any, prejudice is required to establish that an indigent capital defedant was denied access to mental health experts to present psychological or psychiatric circumstances in mitigation of sentence, because such requests were prohibited as a matter of state law, or because counsel was ineffective in not requesting such services prior to trial?

3. Whether petitioner was denied effective assistance of counsel at the sentencing phase of his capital trial because of counsel's failure to investigate the defendant's background for mitigating circumstances?

OPINIONS BELOW

The opinion of the Mississippi Supreme Court on direct appeal is reported at 453 So.2d 337 (Miss. 1984). The opinion of the that court denying petitioner's post conviction Motion to Vacate Judgment and Sentence, is styled Dufour v. State, (No. 55, 053, December 18, 1985)(Appendix A). Rehearing was denied without opinion of February 26, 1986. (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the Mississippi Supreme Court as to Petitioner's post conviction application was entered on December 18, 1985. A petition for rehearing was denied on February 26, 1986.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserting herein deprivation of his rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution which provides in part:

> No person shall be . . . deprived of life liberty or property, without due process of law . . .

2. The Sixth Amendment to the Constitution which provides in part:

> . . . in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense.

3. The Eighth Amendment to the Constitution which provides in part:

> . . . Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. The Fourteenth Amendment to the United States Constitution which provides in part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF FACTS AND PROCEEDINGS

A. FACTS:

On March 31, 1983, following a jury trial in the Circuit Court of the First Judicial District of Hinds County, Mississippi, Petitioner was convicted of capital murder and sentenced to death for the killing of Earl Wayne Peeples during the commission of a robbery on October 14, 1982.

The principal evidence against Petitioner at trial was the testimony of his alleged accomplice, Robert Taylor. Taylor testified that he participated in the robbery and killing of Peeples, and admitted killing another man, Danny King, during the same incident. Taylor testified pursuant to a plea agreement with the State.

According to Taylor, he and Petitioner arrived in Jackson, Mississippi on October 13, 1982, en route from Florida to Houston, Texas. Taylor slept during part of the trip and woke up in the car outside of a bar in Jackson. He entered the bar, which was frequented by homosexuals, shortly after midnight on the morning of October 14, 1982, and said he found Petitioner already inside.

Taylor testified that he and Petitioner subsequently left the bar and drove to Peeples' apartment house with Peeples and King and another person. Once inside the apartment according to Taylor, he went into the kitchen, created a diversion, and grabbed a knife and screwdriver. He then went into the other room. He then threw Petitioner one of the instruments. Then, according to Taylor, Petitioner held the knife on Peeples while he questioned him as to where he kept his money. When Peeples asked for time to get money, Petitioner stabbed him several times.

Taylor described Petitioner to have thrust the steak knife deep into Peeples' chest. At the same time, Taylor stabbed King

with a screwdriver several times. Taylor then allegedly took a shower and when he came out he observed that Peeples' pockets were turned inside out and that Petitioner had looked through Peeples' personal belongings and put them in a blanket which Petitioner then placed in the rear seat of Peeples' car. Taylor drove the car approximately one quarter mile from the apartment when the car became stuck on the side of the road. Taylor stated that after the car became stuck, Petitioner requested him to return to the apartment to locate King's car. As Taylor was returning to the apartment he was arrested by police who observed him running barefoot and shirtless. Following his arrest, Taylor confessed to killing King and implicated Petitioner in the killings of King and Peeples.

Petitioner testified at trial. He testified that he and Taylor arrived in Jackson on October 13, 1982, in Taylor's car, en route from Florida to Texas. The two men went to a bar frequented by homosexuals and shot pool. Petitioner left Taylor in the bar and returned alone to Taylor's car where he went to sleep. He awoke the next day and waited for Taylor to return. He could not move the car as he did not have the keys to it.

A disinterested witness who worked in the building in front of which the car was parked, confirmed seeing Petitioner apparently sleeping in the car. When Taylor did not return to the car by the afternoon of October 14, 1982, Petitioner went to a boarding house to wait for him. The following day he learned from reading a newspaper that Taylor had been arrested and had implicated him in the killings of Peeples and King. He did not contact Taylor or the police because he was on parole in another state and should not have been in Mississippi. On October 29, 1982, Petitioner returned with a companion to the same bar in which he had been previously with Taylor. He was arrested there after having been recognized by an employee of the bar who called the police.

Following Petitioner's conviction for capital murder for the killing of Earl Peeples, a separate jury proceeding was held to determine whether Petitioner should be sentenced to death. During the penalty phase of Petitioner's trial, the state contended that Petitioner should be sentenced to death because (1) the killing of Peeples was committed during the commission of a robbery for pecuniary gain, and (2) the circumstances of the offense were "especially heinous, atrocious and cruel". The State's evidence that the circumstances of the offense were "especially heinous, atrocious and cruel" consisted in large part of Taylor's testimony concerning the circumstances of Peeples' killing. The only evidence in support of the State's contention that Petitioner killed Peeples in the course of a robbery and for pecuniary gain was Taylor's testimony. No evidence was offered at the sentencing hearing by counsel for Petitioner. The jury found that the aggravating circumstances were established and returned a verdict for the death penalty. Immediately following the return of the jury's verdict, the court sentenced Petitioner to death. Petitioner filed a timely appeal of his conviction and death sentence with the Supreme Court of Mississippi.

B. HOW FEDERAL QUESTIONS WERE PRESERVED

Each of the issues were presented to the Mississippi Supreme Court for review in a post-conviction application entitled Motion to Vacate Judgment and Sentence, pursuant to Mississippi Code Annotated Sec. 99-39-1, et seq. (Supp 1984), providing for such review. With respect ot each issue Petitioner claimed violation of his Constitutional rights, citing the appropriate Constitutional amendment and authorities to the Mississippi court in support of his contentions. As set forth in the opinion of the Mississippi court the constitutional claim that the defendant was denied effective assistance of counsel at the sentencing hearing, was adjudicated on its merits and rejected by that court, and thereby rejecting Petitioner's request for the appointment of an

expert to assist him in presenting his claim. Slip op. at 2-3, 4-6. Similarly, the Mississippi Supreme Court expressly ruled on the merits of and rejected Petitioner's claim that the excusal of jurors who had reservations about the imposition of the death penalty but who nonetheless could be fair and impartial as to guilt or innocence. Slip opinion at 7-8.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED TO ADDRESS THE IMPORTANT ISSUE OF WHETHER A STATE COURT MAY REJECT BECAUSE THERE WAS NO SHOWING OF PREJUDICE, A POST-CONVICTION CLAIM BY AN INDIGENT CAPITAL DEFENDANT THAT HE WAS UNCONSTITUTIONALLY DENIED ACCESS TO MENTAL HEALTH EXPERTS TO PRESENT MITIGATING EVIDENCE AT HIS SENTENCING HEARING, OR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THEY DID NOT ADEQUATELY REQUEST SUCH SERVICES PRIOR TO TRIAL, WHILE AT THE SAME TIME REFUSE TO GRANT A REQUEST BY THE DEFENDANT FOR FUNDS TO RETAIN AN EXPERT TO PROVE HIS CLAIM IN THE POST-CONVICTION PROCEEDINGS.

2. THE WRIT SHOULD BE ISSUED IN ORDER TO ADDRESS THE IMPORTANT ISSUE OF WHAT, IF ANY, STANDARD OF PREJUDICE IS REQUIRED IN ORDER TO OBTAIN RELIEF ON THE CLAIM THAT AN INDIGENT CAPITAL DEFENDANT WAS DENIED ACCESS TO A MENTAL HEALTH EXPERT TO PRESENT EVIDENCE IN MITIGATION OF SENTENCE EITHER BECAUSE STATE LAW PROHIBITED SUCH REQUESTS, OR BECAUSE HIS ATTORNEYS WERE INEFFECTIVE IN MAKING SUCH A REQUEST.

In his post-conviction application before the Mississippi Supreme Court, Petitioner asserted a denial of his constitutional rights because he was denied the opportunity to retain a psychiatric and/or psychological expert who could have assisted in his defense and sentencing, or in the alternative, a denial of effective assistance of counsel because his counsel did not adequately request such assistance because of they understood existing state law to prevent such requests.

Prior to trial defense counsel failed to make application to the court for funds to conduct a psychological evaluation of Petitioner for the purpose of determining whether mitigating

circumstances existed. Although counsel did seek and obtain an evaluation as to competency and criminal responsibility at the time of the crime, counsel made no attempt to obtain the services of experts to conduct psychological evaluations to determine whether mitigating circumstances existed. The affidavits submitted below and which were reviewed by the Mississippi court in rendering its decision, clearly indicate that an examination for competency and criminal responsibility is no substitute for a psychological investigation for mitigating circumstances. As stated by Dr. Charles Stanley, who examined Petitioner prior to trial:

> 3. We were never asked to evaluate Mr. Dufour for the purpose of assisting the defense in developing psychological mitigating factors. This would have required a whole different kind of evaluation. The difference between the two types of evaluations [competency and determination of mitigating factors] is like the difference between a lawyer representing a client for a land deed and representing a client for a bankruptcy. We would have needed to conduct psychological tests which we did not do in this case. We would have needed to thoroughly examine Mr. Dufour's history which we did not do. We simply were not ordered by the court to conduct that type of evaluation. The evaluation for mitigating psychological factors would have involved additional time and expense.
>
> 4. Because our evaluation of Mr. Dufour was limited to the above-stated purposes, we could not provide any psychological mitigating explanation for why Mr. Dufour would have committed the alleged crimes, if such explanation does exits.

Affidavit of Dr. Charles Stanley. No mental health expert was made available to the defense in part because counsel for Petitioner failed to request such assistance. As explained by counsel,

> The decision not to hire a psychiatrist or psychologist was based on financial constraint imposed and was not strategic in nature. Donald Dufour is an indigent person. We did not move the court for funds for an investigation of psychological mitigating factors because we did not believe the court would grant such a motion, there being no statutory authority in Mississippi.

See Affidavits of of Attorneys Kenneth Stribling and Robert S. Houston.

Prior to Petitioner's trial, decisions of the Mississippi Supreme Court indicated that an indigent defendant did not have a constitutional right to such assistance. See Davis v. State, 374 So.2d 1293 (Miss. 1979); Phillips v. State, 197 So.2d 241, 244 (Miss. 1967); Laughter v. State, 235 So.2d 468 (1970). Thus, although counsel for Petitioner indicated that such expert assistance was "absolutely necessary," no requests were made because they "did not believe the court would grant such a motion, there being no statutory authority in Mississippi." Affidavit of Stribling and Houston, paragraph 8. 1/

In effect, Petitioner was denied this important constitutional right due to one of two things: (1) the Mississippi Supreme Court's prior decisions which did not provide for the provision of experts under which his counsel presumably were acting, or (2) the misunderstanding of state law by his counsel who thought that such expert assistance was prohibited by state law. 2/

With respect to these claims the Mississippi Supreme Court denied relief stating:

1/ Later the Mississippi Supreme Court modified its rule to and indicated that there would be no blanket prohibition against such requests but would be decided on a case-by-case basis. See, e.g., Ruffin v. State, 447 So.2d 113, 118 (Miss. 1984). However, this decision was not rendered until after Petitioner's trial. Accordingly, Petitioner did not have the benefit of it.

2/ The Court in Ake v. Oklahoma, 105 S.Ct. 1087 (1985) made clear the a capital defendant has right to expert assistance in areas of mental health under Constitution. Courts have recognized that this right includes obtaining the services of an expert for presentation of mitigating circumstances at a capital sentencing hearing. Westbrook v. Zant, 704 F.2d 549 (11th Cir. 1982). Failure of trial counsel to research the relevant law and present their request to the trial court may have not been excusable, regardless of their belief of the possible success of such a request. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

> Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an examination would have produced the claimed results, nor has prejudice been show.

Slip opinion at 2-3. However in his initial application and in his petition for rehearing Petitioner made clear that he was indigent and could not afford to retain the services of a psychologist or psychiatrist to present mitigating circumstances which could have been presented. 3/

To reject the claim that he, as an indigent, was unconstitutionally denied the right to expert assistance or effective assistance of counsel at the time of trial because he does not make a showing of what would be presented by such an expert puts Petitioner in a catch-22 position - he asserts that he was and is indigent and unconstitutionally denied the assistance of an expert but is denied relief because he is indigent and does not have an expert to assist him in proving his claim.

Although this Court has held that an indigent defendant is not constitutionally entitled to an attorney to pursue discretionary appellate review in noncapital cases, Ross v. Moffitt, 417 U.S 606 (1974), it has also held that states are required to take measures to assure meaningful access to the courts so that indigent inamtes can present their claims. Bounds v. Smith, 430 U.S. 817 (1977). Moreover, this Court has observed

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3/ In his affidavit supporting his post-conviction application, Petitioner stated that he "qualified as an indigent in this case at trial and I am still without funds to hire an attorney. The attorneys I have now are doing this on a volunteer basis. I have no Money to pay them or to hire any experts or investigators." Affidavit of Donald Dufour at page 2. In his post-conviction application Petitioner requested that the Mississippi Court enter an order "allowing funds to Petitioner to retain the services of an investigator and or psychologist psychiatric expert". Motion at page 33. He renewed that request in his petition for rehearing, "In order to properly adjudicate this claim Mr. Dufour requests that this court appoint him an independent expert to assist him making any showing the court may require". Petition for rehearing at 3.

that unlike noncapital cases, most death penalty cases will be subject to federal post-conviction review. Barefoot v. Estelle, 463 U.S. 880 (1983). Although, such as in this case, volunteer counsel often provide services on a pro bono basis and represent indigent defendants in post-conviction proceedings, funds for experts are not available. Requiring an indigent defendant to prove "prejudice" by establishing what an expert would have presented at trial, and then denying the Petitioner funds to retain an expert in post-conviction proceedings, dooms the claim to failure without review of its substance. Thus, this Court should grant the writ to review this important issue.

Moreover, with respect to the substantive claim that he was denied expert assistance, contrary to the decision of the Mississippi court below, the Court in Ake v. Oklahoma, 104 S. Ct. 1087 (1985) did not require that indigent capital defendant make a showing of "prejudice". In Ake the capital defendant had requested the appointment of an expert to assist him in the evaluation of whether an insanity defense was appropriate. The Court found, inter alia, that the refusal of the trial court to provide such assistance denied the indigent capital defendant important constitutional rights. Importantly, however, the Court did not remand the case to determine whether an expert would have found that the defendant was insane, or would have provided testimony relevant to the question of sentencing. Instead, the Court vacated the conviction and the death sentence and remanded the case for a new trial. Thus, the Court did not require a showing of prejudice, but, much like the denial of counsel to the indigent defendant, presumed that prejudice occurred. Accordingly, the standard utilized by the Mississippi Court was erroneous and this Court should grant the writ to correct the decision.

3. THE WRIT SHOULD BE ISSUED TO REVIEW THE DECISION BY THE MISSISSIPPI COURT WHICH HELD, WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING THAT PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL SENTENCING HEARING

In his post-conviction application Petitioner alleged that he was denied effective assistance of counsel at his capital sentencing hearing. At his sentencing hearing counsel presented no evidence in mitigation of sentence. In his post-conviction application, Petitioner established that there were persons willing to testify and who were available. See Affidavits of John Dufour and George Dufour. In addition, his counsel indicated that they conducted little if any investigation into Petitioner's background because of the lack of financial resources and the fact that most of Petitioner's family were from out of state. See Affidavit of F. Kent Stribling and R. L. Houston. Despite these matters, the Mississippi Supreme Court denied the claim summarily without an evidentiary hearing. The decision by the Mississippi Supreme Court conflicts with decisions by other courts which have held that an attorneys' failure to conduct and adequate investigation into a defendant's background and to present available mitigating evidence warrants that the sentence be vacated. See, King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984); Tyler v. Kemp, 755. F.2d 741 (11th Cir. 1985), cert. denied, 34 Cr. L. Rptr. 411 (1985).

The Sixth Amendment guarantees to all criminal defendants "the right to the effective assistance of counsel." See McMann v. Richardson, 397 U.S. 759, 771 (1970). In Strickland v. Washington, 104 S.Ct. 2052 (1984), the Court enunciated standards by which to measure a claimed denial of effective assistance of counsel. The test set forth by the Court requires a two-pronged showing of (1) deficient performance by counsel as measured by

the standards of the profession and (2) prejudice to the defendant. Id. at 2064.

The Court held that counsel's performance is deficient if it falls "below an objective standard of reasonableness . . . considering all the circumstances." Id. at 2065. With respect to the prejudiced standard the Court directed that in a capital case, the two phases of trial be analyzed separately:

> When a defendant challenges a conviction, the question is whether there is a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is reasonable probability that, absent the errors, the sentencing--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 2069. The Court defined a "reasonable probability" as a "probability sufficient to undermine confidence in the outcome." Id. at 268.

Counsel's performance may be adjudged inadequate either by reference to specific errors or based on the performance as a whole. See United States v. Cronic, 104 S.Ct. 2039, 2046 n.20 (1984). Moreover, there may be some circumstances where the reviewing court may presume prejudice where the likelihood that any lawyer could provide effective assistance is "small". Cf. United States v. Chronic, 104 S.Ct. at 2047.

As the Court held in Woodson v. North Carolina, 428 U.S. 280, 304 (1976), "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Obviously, given the scope and nature of capital sentencing, it is essential "that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." Jurek v. Texas, 428 U.S. 262, 276 (1976). Just as obvious, such

information will not be presented to the jury unless counsel undertakes an adequate investigation for mitigating evidence and presents it at sentencing.

An independent and thorough investigation by counsel into the background of a capital defendant and the circumstances of his crime is critical to any adequate presentation of mitigating evidence about a capital defendant, and has been recognized by all courts which have addressed the issue. See for example, Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978); Pickens v. Lockhart, 714 F.2d 1455 (8th Cir. 1983); Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983); Baldwin v. Maggio, 704 F.2d 1325, 1382-33 (5th Cir. 1983), cert. denied, 104 S.Ct. 2669 (1984), Bell v. Watkins, 692 F.2d 999, 1009 (5th Cir. 1982) cert. denied, 104 S.Ct. 142 (1982); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); ABA Standards for Criminal Justice (2d Ed. 1980) at 4-55. Courts have held that the Sixth Amendment "requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and to ground the strategic selection among those potential defenses on an informed, professional evaluation of their relative prospects for success." Baldwin v. Maggio, 704 F.2d at 1332-33. Such an inquiry should require at a minimum "an independent search for witnesses witnesses with knowledge of the defendant's character, disposition to commit crimes and extenuating circumstances." Id. at 1333; see Goodpaster, The Trial for Life 58 N.Y.U.L.Rev. 299, 323-24.

The ABA Standards state that:

> "The lawyer needs to know essential facts, including events surrounding the act charged, information concerning the defendant's background . . . In criminal litigation, as in other matters, information is the key guide to decisions and action. The lawyer who is ignorant of the facts of the case cannot serve the client effectively."

Id. at 4-33. Similarly, Standard 4-4.1 states that:

> "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."

Id.

Once an adequate investigation has been conducted, at sentencing the attorney has a "duty to advocate the defendant's cause," see Strickland v. Washington, 104 S.Ct. at 2065, which includes the duty to present evidence in mitigation. The ABA Standards for Criminal Justice (2d Ed. 1980), describe the lawyer's responsibility as follows:

> "The lawyer . . . has a substantial role to perform in raising mitigation factors . . . to the court at sentencing. This cannot be effectively done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, educational, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as well as mitigating circumstances surrounding the crime itself."
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> * * *
>
> "[t]he defense attorney should recognize that the sentencing stage is the time at which for many defendants the most important service of the entire proceeding can be performed . . . the attorney should take particular care to make certain that the record of the sentencing proceedings will accurately reflect all relevant mitigating circumstances relating either to the offense or to the characteristics of the defendant . . . and to ensure that such record will be adequately preserved."

ABA STANDARDS at 4-55, 18-6.3.

In this case, if they had investigated, 4/ counsel would have discovered substantial witnesses who could have and would have provided favorable evidence regarding Petitioner. Specifically, if witnesses who were available and willing to come forward had testified, the following facts could have been elicited:

a. Petitioner was raised in an unstable family environment. He family was constantly required to move because of his father's job. Because of this, Petitioner never had a stable and permanent living environment and was unable to make any friends. Consequently, he tended to become withdrawn and isolated.

b. Petitioner was subjected to violent physical abuse by his father. His father was an alcoholic who physically abused Petitioner's mother and Petitioner. He would severely beat the mother and Petitioner whenever he was intoxicated. At times he would beat Petitioner by hitting him with a leather belt, using the buckle, or with a wooden stick. The violence inflicted on Petitioner by his father was both senseless and random.

c. Despite being the subject of physical abuse, Petitioner was a contributing member of his household. He spent most of his

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4/ In their affidavit counsel stated that:

> The failure of the trial court to provide us with an investigator hindered our preparation for the sentencing phase of trial to the extent that we were able to conduct almost not investigation of mitigating factors. Donald Dufour lived almost all his life in Orlando, Florida. The only thing we were able to do was talk on the telephone with two of Mr. Dufour's brothers. From the conversation with the brothers we became aware that in order to conduct the necessary investigation of mitigating circumstances we would have to travel to Florida or hire an investigator to do so. Because of time and financial constraints, we were unable to go to Florida to Investigate Mr. Dufour's background and history . . . .

Affidavit of F. Kent Stribling and R. L. Houston.

time as a child helping his family do things around the house. His father was rendered partially disabled by an injury which required the children in the family to do most of the work. Petitioner was seen by other family members as always being willing to help his mother and always trying to please his father. However, his efforts were apparently never recognized by Petitioner's father, who continued to abuse Petitioner nonetheless.

d. Petitioner was never involved in any trouble while growing up. To the contrary, he was seen as an affectionate and loving person who cared for many older people in his neighborhood. Petitioner volunteered to do chores for these persons and would assist them whenever he could. He also was known to be very affectionate and loving toward children.

e. Around the age of eighteen, Petitioner began to experiment with drugs, primarily to escape his unstable family life. He started sniffing glue and soon experimented with other illegal substances. Eventually, he became a heroin addict and once almost lost his right arm because of an infection developed from injecting drugs. Despite his addiction, he tried on many occasions to give up drugs but was not able to. During this period of time when they were most needed, his family offered no support to Petitioner. As a result, Petitioner became isolated from family members and even more addicted to drugs.

f. Petitioner was substantially affected by the death of his mother in 1977. She died of cancer, and at the time Petitioner was incarcerated in a Florida institution. The family members observed him as almost uncontrollable in his grief when he attended his mother's funeral. Other members recognized that Petitioner's mother was probably the only person who was ever close to Petitioner. The death of his mother exacerbated both the personal and emotional problems Petitioner was suffering, and his drug addiction upon his release became more acute.

g. Despite the crimes with which he was convicted, there are persons who know and care for Petitioner and would be affected by his death.
See, Affidavits of John Dufour and George Dufour. These and other circumstances have been recognized by this Court as constitutionally recognized mitigating circumstances which a sentencer cannot be precluded from considering. Eddings v. Oklahoma, 455 U.S. 104 (1980); Lockett v. Ohio, 438 U.S. 586 (1978). However, in this case, the jury was precluded from considering these circumstances - precluded because of counsel's inaction.

This picture of Petitioner stands in stark contrast to what was presented, or more accurately what was not presented at sentencing. Absolutely no evidence was presented by defense counsel at the capital sentencing hearing. Testimony of such witnesses was critical in order for the jury to consider the circumstances of Petitioner's life which might have been the basis for a sentence of less than death. The prosecution exploited this lack of information about the Petitioner during closing arguments when it asserted to the jury that:

> Now, y'all heard all the testimony in this case and I got this morning early, earlier than I usually do, and I was wondering what the defense was going to argue under the classification mitigating circumstances. From the record in this case, I can't think of one reason, not one bit of testimony, I couldn't come up with any mitigating circumstances. And let me tell you something. It's unfortunate that a man can live twenty-six or twenty seven years and not have one thing in his background in his favor.

R. 659, 660.

In this case there was a wealth of mitigating evidence which was never presented to the jury because the attorneys never undertook an adequate and complete investigation. Defense counsel

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R. 659, 660.

In this case there was a wealth of mitigating evidence which was never presented to the jury because the attorneys never undertook an adequate and complete investigation. Defense counsel

failed to investigate whether there were any potential witnesses who could have presented favorable testimony and why Petitioner deserved to have his life spared. This Court should issue the writ to review these circumstances and vacate the sentence of death.

CONCLUSION

For the reasons stated herein the Court should issue a writ of certiorari to the Supreme Court of Mississippi to review the decision of that court in this case.

Bernard S. Grimm
500 Indiana Avenue, N.W.
WAshington, D.C. 20001
202-628-1200

Robert E. Morin
Suite 201
419 Seventh Street, N.W.
Washington, D.C. 20004
202-638-6700

IN THE SUPREME COURT OF MISSISSIPPI

NO. 55,053

DONALD WILLIAM DUFOUR

V.

STATE OF MISSISSIPPI

ON MOTION TO VACATE JUDGMENT AND SENTENCE

EN BANC.

ROY NOBLE LEE, PRESIDING JUSTICE, FOR THE COURT:

Petitioner Donald William Dufour was convicted in the Circuit Court for the First Judicial District of Hinds County, Mississippi, of capital murder, and was sentenced to suffer the death penalty. On April 11, 1983, he filed a motion for new trial raising twenty-one (21) grounds for relief, which motion was subsequently denied. Petitioner appealed to the Mississippi Supreme Court, which unanimously affirmed the conviction and sentence on June 6, 1984, and a petition for rehearing was denied July 25, 1984. The facts of the case are stated in Dufour v. State, 453 So. 2d 337 (Miss. 1984).

Petitioner filed with the United States Supreme Court a petition for writ of certiorari to the Mississippi Supreme Court, which was denied February 19, 1985. Dufour v. Mississippi, ___ U.S. ___, 84 L.Ed.2d 368, ___ S.Ct. ___ (1985). Petition for rehearing was denied by the United States Supreme Court April 1, 1985.

On June 17, 1985, the petitioner filed a Motion to Vacate Judgment and Sentence, pursuant to Mississippi Code Annotated § 99-39-1, et seq. (Supp. 1984). Petitioner seeks relief under the Mississippi Uniform Post-Conviction Collateral Relief Act, but claims that the procedural bar provision of the act did not apply to him since it was not in effect at the time of petitioner's 1983 trial. We hold that petitioner's contention that the waiver and procedural bar provisions of the act do not apply to his case is without merit. Actually, Mississippi Code § 99-39-1, et seq. is largely a codification of the existing law. Leatherwood v. State, 473 So. 2d 964 (Miss. 1984); Tokman v. State, 475 So. 2d 457 (Miss. 1985).

CLAIMS

A.

Petitioner was Deprived of His Right to Effective Assistance of Counsel.

(1) Failure to Investigate and Present Mitigation Witnesses.

Petitioner claims that defense counsel failed to investigate whether there were any potential witnesses who could have presented favorable testimony as to why he deserved to have his life spared. Petitioner's counsel, R. L. Houston, talked with petitioner's brothers in Florida on several occasions, although they state in their affidavits that they cannot recall speaking to the Jackson attorneys. They told Houston that they would not come to Jackson nor did they want to get involved in the trial of their brother's case. They refused to help petitioner at that time.

(2) Failure to Investigate, Obtain and Present Psychiatric or Psychological Evidence.

Petitioner claims that defense counsel failed to make application to the trial court for funds to conduct a psychological evaluation of petitioner for the purpose of determining whether mitigating circumstances existed. Further, that he had no expert assistance because counsel did not request it. However, petitioner was examined pursuant to a court order. The professionals were not people selected by the State, but by the trial court. Petitioner has failed to present facts which show there existed mitigating circumstances of a psychological nature, which could have been presented by Dr. Stanley. It is not shown that such an

examination would have produced the claimed results, nor has prejudice been shown.

(3) Trial Counsel's Failure to Request Instructions on Lesser-Included Offenses and Elements of the Primary Offense Charged.

Petitioner claims that his counsel was ineffective for not offering a complete instruction on, or objecting to the failure to instruct, on the elements of the underlying felony of robbery. The Court considered the question of whether or not a robbery was in fact committed, and found that the evidence fully supported the finding that robbery had been committed. Dufour v. State, 453 So. 2d at 346.

(4) Failure to Object to Prosecutorial Misconduct.

Prosecutorial misconduct will be referred to hereinafter. Petitioner contends that his counsel failed to prevent persistent misconduct of the prosecutor throughout the trial and the sentencing. Appellee contends that the examples cited by petitioner are within the limits of proper conduct and argument and that there was no prosecutorial misconduct. We think that petitioner has failed to show prejudice under this claim.

(5) Failure to Adequately Cross-Examine State's Witness.

Petitioner claims that defense counsel failed to adequately cross-examine the State's primary witness, Robert Taylor. The record reflects that the plea bargain agreement between the State and Taylor was introduced into evidence, paragraph 2 of which agreement states:

> Upon entry of a plea of guilty to the aforesaid crimes [the murders of Daniel Earl King and Earl Wayne Peeples], the State will recommend that Robert Taylor be sentenced to two (2) concurrent life terms rather than seeking the death penalty.

Any jury of average intelligence would have to be aware of benefits to Taylor of the plea agreement.

(6) Failure to Object to Improper Evidence of Other Crimes.

Petitioner claims that defense counsel failed to object in a timely manner to improper evidence of other crimes, viz, that the prosecutor deliberately put before the jury evidence that another person had been murdered. The jury already knew that two people were murdered in the apartment that night and evidence had been introduced over objection to such facts. [Exhibits 4-N (R.335); 4-D (R.336) (R.341-3420]. Petitioner has not shown that he was prejudiced by such alleged failure.

(7) Failure to Make an Adequate Request for Investigative Services.

On the direct appeal in this case, the appellant assigned as Error #1 that the trial court erred in refusing the appellant's request to hire an investigator. Although no proposed names, locations or investigative possibilities were pointed out to the lower court, as stated, supra, relatives of the petitioner were unwilling to cooperate or come to Mississippi for the purpose of assisting in the trial.

(8) Failure to Object to Prosecution-Prone Jury.

The substance of this contention will be discussed in Section G, infra.

(9) Failure to Present Errors on Appeal.

Discussion of authorities hereinafter will relate to this contention.

The nine (9) claims hereinabove, which relate to the total claim of ineffective assistance of counsel must be considered, singly and collectively, after applying the standards set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court has applied the standard in Leatherwood v. State, 473 So. 2d 964 (Miss.

1985); Lambert v. State, 462 So. 2d 308 (Miss. 1984); Ward v. State, 461 So. 2d 724 (Miss. 1984); In Re Hill, 460 So. 2d 792 (Miss. 1984); Stringer v. State, 454 So. 2d 468 (Miss. 1984); and Thames v. State, 454 So. 2d 486 (Miss. 1984).

In Leatherwood v. State, 473 So. 2d 964 (Miss. 1985), on Motion to Vacate, or to Set Aside Judgment and Sentence pursuant to the Mississippi Uniform Post-Conviction Collateral Relief Act, Mississippi Code Annotated § 99-39-1, et seq. (Supp. 1985), relying upon Strickland v. Washington, supra, this Court said:

> The legal test as to effective assistance of counsel was recently established in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), where the United States Supreme Court held that on a claim of ineffective assistance of counsel the benchmark is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93. This is because counsel plays a critical role in assuring that the adversarial system does produce a just result.
>
> The burden of proving ineffective assistance of counsel is on the defendant to show that the counsel's performance was (1) deficient, and that (2) the deficient performance prejudiced the defense. If the defendant fails to prove either component then reversal of a conviction or sentence is not warranted. ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed. at 693.
>
> The defendant is required to specify the acts or omissions that are alleged to be the result of unreasonable legal assistance.
>
> In assessing whether or not a defendant received a fair trial or whether a fair trial was undermined by counsel's errors: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." ___ U.S. at ___, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.
>
> In assessing whether counsel's performance was deficient the standard of performance is that of "reasonably effective assistance." ___ U.S. at ___, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. This continues to be reasonableness under prevailing professional norms and reasonableness considering all the circumstances.
>
> There is a strong presumption that counsel's conduct is within the wide range of reasonable professional conduct. There are however certain basic duties required of an attorney when representing a criminal defendant. These duties include the following: to assist the defendant, to advocate the defendant's cause, to consult the defendant on important decisions and to keep the defendant informed of important developments. However, there is no exhaustive list and no set of detailed rules which can take into account all the circumstances counsel faces or all the legitimate decisions on how to represent a defendant. There is no single, particular way to defend a client or to provide effective assistance.
>
> To fairly assess the attorney performance "every effort [must] be made to eliminate the distorting effects of hindsight." ___ U.S. at ___, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. A particular strategy must be assessed from its inception as to its unreasonableness rather than from its ultimate success or lack thereof.
>
> The totality of the evidence before the judge or jury should be considered in assessing whether there was prejudice, not just the factual findings which are affected by error.
>
> Along with the presumption that counsel's conduct is within the wide range of reasonable conduct, there is a presumption that decisions made are strategic. Murray v. Maggio, 736 F.2d 279, 292 (5th Cir.1984). Courts are also reluctant to infer from silence an absence of strategy. Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).

473 So. 2d at 968-69.

We are of the opinion that the petitioner has not demonstrated that his claims of ineffective assistance of counsel have met the two-pronged test of Strickland v. Washington, supra, viz, (1) counsel's performance was deficient to the extent that he made errors so serious that counsel was not functioning as the "counsel" guaranteed the petitioner by the Sixth Amendment, and (2) the deficient performance prejudiced the defense to the extent that counsel's errors were so serious as to deprive petitioner of a fair trial, a trial whose result is reliable.

B.

Persistent Prosecutiral Misconduct Rendered
The Trial and Sentencing Fundamentally Unfair.

Under Claim B, the petitioner presents eleven (11) designated areas in which he contends that prosecutorial misconduct rendered the trial and sentencing unfair. Motion, pp. 16-26. These claims were not raised either at trial or on direct appeal. Therefore, they are waived, and petitioner

cannot now raise those issues. Billiot v. State, On Motion to Vacate or Set Aside Sentence, decided October 30, 1985 [Not yet reported]; Wilcher v. State, Miss. Nos. 53,370 and 54,959, decided October 30, 1985. [Not yet reported]; Leatherwood v. State, 473 So. 2d 964 (Miss. 1985); and Callahan v. State, 426 So. 2d 801 (Miss. 1983), cert. den. 461 U.S. 943, 77 L.Ed.2d 1300, 103 S.Ct. 2118 (1984).

C. - H(2d)

(No claim designated C).

Section D of the motion claims error on the failure of the lower court to grant an instruction on lesser-included offenses.

Section E contends the lower court did not instruct the jury on elements of the underlying felony of robbery.

Section F states the court failed to adequately instruct the jury at sentencing.

Section G claims that allowing the jury to consider as an aggravating circumstance, robbery for pecuniary gain, failed to narrow the class of death eligibility.

Section H states that allowing the jury to be qualified under the criteria set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), prior to the guilt phase, resulted in a prosecution-prone jury.

Section H(2d) claims petitioner was denied the assistance of an independent psychological and/or psychiatric expert to assist him in his defense.

Requests were not made for the instructions referred to under Sections D and E; no assignments of error were asserted on the instructions during the sentencing phase or presented to the Court on direct appeal under Section F, and the claims are waived and procedurally barred. The Section G question was not raised at trial or on direct appeal and is waived. The Section H issue has been decided by this Court

adversely to petitioner's contention, and the Fifth Circuit Court of Appeals has done likewise.[1]

In Section H(2d), petitioner claims that he was denied the assistance of an independent psychological and/or psychiatric expert to assist him in his defense. Petitioner was examined on court order by motion of the State. No further motion was made for additional examination at trial, no error was assigned in the denial of such assistance on direct appeal The claim was waived and is procedurally barred.

We have considered the claims asserted by the petitioner, singly and collectively, and are of the opinion that they do not justify vacating the judgment and sentence in this case. Therefore, the Motion to Vacate or Set Aside Judgment and Sentence is denied.

MOTION TO VACATE JUDGMENT AND SENTENCE DENIED.

PATTERSON, C.J., WALKER, P.J., HAWKINS, DAN LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., CONCUR.

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[1]Petitioner relies on Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). In Rault v. Louisiana, ____ F.2d ____ (No. 85-3281, 5th Cir. 1985), the Fifth Circuit Court of Appeals rejected the Grigsby rationale. Note that the United States Supreme Court has granted the State of Arkansas petition for writ of certiorari to review the decision of the Eighth Circuit affirming the district court's decision in Grigsby, supra. See: Lockhart v. McCree, ___ U.S. ____, 54 U.S.L.W. 3223, No. 84-1865 (October 8, 1985).

Appendix B

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN FEBRUARY 26, 1986

ANDERSON, J.

56,159 James E. Brown v. Bulah D. Brown; Chancery, Oktibbeha; Affirmed. Prather, J., Not Participating.

SULLIVAN, J.

X 55,362 Nazareth Gates v. State; Circuit, Oktibbeha; Conviction of Murder and Sentence of Life Imprisonment Affirmed.

56,034 Gary Moawad v. State; Circuit, Panola; Apellant's Papers Treated as Motion for Out-of-Time Appeals of Three (3) Convictions and Sentences in the Circuit Court of Panola County, MS; Motion for Out-of-Time Appeals Sustained and Indigency Hearing Ordered. Anderson, J., Not Participating.

56,170 James Ray Burleson v. Gerald Dean Burleson; Chancery, Attala; Affirmed. Appellee's Motion for Attorney's Fees Sustained in the Amount of $400.00.

56,550 Lottie Creel and Amy Ladner v. Lloyd Watson and Lula Faye Watson; Chancery, Harrison; Affirmed.

Misc. #2044 Richard Montalbano v. Miss. State Board of Chiropractic Examiners; Motion for Stay of Execution/Supersedeas Overruled. See Miss. Code Ann. § 73-6-19(5).

ROBERTSON, J.

X 55,383 Ruben Doyle Foster, SR. v. State; Circuit, Lee; Reversed and Remanded for a New Trial.

X 56,053 Frank Talbert Malone v. State; Circuit, Hancock; Conviction of Armed Robbery and Sentence of Eleven (11) Years Affirmed.

X 56,465 Estate of Roxie Bunch, Dec'd, Dr. S. L. Bailey and James Bailey, Executors v. Heirs of Roxie Bunch; Chancery, Attala; Reversed and Remanded.

PRATHER, J.

X 56,526 Dorothy B. Olson v. Jeri Olson Flinn; Chancery, Adams; Affirmed.

56,417 Louis Watson v. State; Circuit, Washington; Conviction of Felony Shoplifting as an Habitual Offender and Sentence of Five (5) Years Affirmed.

DAN LEE, J.

X 55,336 Elf Acquitaine, Inc. (Formerly Acquitaine Oil Corp.), et al. & Florida Exploration Co., et al. v. Amoco Production Co. & Sabine Corp.; Chancery, Jefferson Davis; Reversed and Rendered.

X 56,086 James Alfred Coyne, Jr. v. State; Circuit, Pearl River; Conviction for Possession of Marijuana with Intent to Deliver and Sentence of Ten (10) Years Affirmed.

55,349 George F. Foster v. Donna M. Foster Barefoot; Chancery, Leflore; Affirmed.

56,144 Terry Hanner v. State; Circuit, Hinds; Conviction of Grand Larceny as an Habitual Offender and Sentence of Five (5) Years Affirmed.

DAN LEE, J. (Cont'd):

56,475 Louis Watson v. State; Circuit, Washington; Conviction of Felony Shoplifting as an Habitual Offender and Sentence of Five (5) Years Affirmed.

55,030 Town of Lucedale, MS v. George County Nursing Home, Inc.; Motion for Statutory Penalty Overruled.

HAWKINS, J.

XX 55,035 John E. Hughes, Jr. v. Maurice F. Tyler; Circuit, Leflore; Affirmed. Robertson and Sullivan, JJ., Specially Concur.

X 55,309 Frank A. Nichols, et ux. v. Raymond C. Stacks d/b/a Raymond C. Stacks Construction Co.; Chancery, Lee; Affirmed in Part, Reversed and Remanded in Part.

X 55,339 Charles Lee Stokes v. State; Circuit, Alcorn; Reversed and Remanded.

X 56,060 Georgia-Pacific Corporation v. Mary Veal; Circuit, Amite; Reversed, and Order of Mississippi Workmen's Compensation Commission Reinstated.

55,372 First Southern Savings Ass'n of Jackson County v. Singing River Mall Co., a Mississippi General Partnership, et al.; Chancery, Jackson; Affirmed.

ROY NOBLE LEE, P.J.

X 55,909 Gwendolyn Smith and James Ray Smith v. Albert Ray Lee, M.D.; Circuit, Walthall; Reversed and Remanded.

55,389 Mid-South Packers, Inc. and American Motorists Ins. Co. v. Richard H. Vance; Circuit, Lee; Affirmed.

55,406 Walter L. Porter v. Dorothy L. Porter; Chancery, Oktibbeha; Affirmed. Appellee's Motion to Strike Overruled.

WALKER, P.J.

55,356 Phillip Scott Livingston v. State; Circuit, DeSoto; Reversed and Remanded.

56,393 Johnny Anderson and Ricky Earl Robinson v. State; County, Coahoma; Conviction of Robbery and Sentence of Twelve (12) Years Affirmed.

56,557 Debra Butler v. State; Circuit, Hinds; Conviction of Felony Shoplifting and Sentence of Five (5) Years, to Run Consecutive to Cases #3920 and #3921, Affirmed.

56,595 Mary Payne v. Mississippi Employment Security Comm'n; Circuit, Neshoba; Affirmed.

PATTERSON, C.J.

X 55,208 Denson A. Ward, III v. Ford Motor Co.; Circuit, Coahoma; Reversed and Remanded.

X 55,263 Patricia Scafidel v. Dr. Benjamin L. Crawford, III, Dr. LaDon Langston & Dr. E. J. Price d/b/a Southwest Clinic for Women; Circuit, Pike; Affirmed.

PATTERSON, C.J. (Cont'd):

X 55,338 Annie McCallister Gray v. Nelson W. Gray; Chancery, Alcorn; Reversed and Remanded.

56,164 Charles E. Smith & Terry Smith v. Massey Ferguson Credit Corporation; Circuit, Bolivar; Affirmed.

THE COURT SITTING EN BANC:

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Petition for Rehearing Denied. Walker, P.J., Hawkins, Prather and Robertson, JJ., Dissent.

54,123 Bankers Life & Casualty Co. v. Lloyd M. Crenshaw; Circuit, Jackson; Motion to Correct Judgment Overruled.

54,966 John Keith Henry v. State; Circuit, Newton; Petition for Rehearing Denied. Original Opinion Modified. Roy Noble Lee, P.J., Not Participating.

55,016 Audrey Smith v. Cleveland Truck & Tractor Repair, Inc.; Circuit, Bolivar; Motion for Stay of Mandate Overruled. Petition for Rehearing Denied.

55,053 Donald William Dufour v. State; Circuit, Hinds; Petition for Rehearing on Motion to Vacate Judgment and Sentence Denied. Anderson, J., Not Participating.

55,328 Edmond L. Ratliff v. City of Jackson, MS; Circuit, Hinds; Petition for Rehearing Denied.

55,944 John V. Pool, III v. State; Circuit, Jones; Petition for Rehearing Denied.

56,000 Sid Shaw and H. A. Dickson v. The Ten Point Co.; Chancery, Hinds; Petition for Rehearing Denied.

56,246 Noxubee County School Board v. Carolyn Overton; Chancery, Noxubee; Petition for Rehearing Denied.

Misc. #1735-E Henderson Sharp, Jr. v. State; Circuit, Lowndes; Motion to Reconsider Motion for Post-Conviction Relief Overruled. Prather, J., Not Participating.

PER CURIAM:

55,433 Mississippi Farm Bureau Mutual Insurance Company v. John Garrett; Motion to Reset Oral Argument Sustained, and Case Set for Hearing on March 11, 1986.

55,435 Employers Mutual Casualty Company v. Teresa Tompkins and William E. Tompkins; Motion to Reschedule Oral Argument Overruled.

56,226 Bruce Telephone Company, Inc. v. Miss. Public Service Commission; Joint Motion for Substitution of Counsel Sustained.

56,558 Jose Artea gpiloto, Et Al. v. State; Motion for Additional Pages to Appellants' Brief Sustained.

PER CURIAM (Cont'd):

56,684 Mary Pearl Blackmon, Et Al. v. Julius Payne and Highland Trucking Company, Inc. and Thomas Jefferson O'Quinn, IV v. Julius Payne and Highland Trucking Company, Inc.; Motion for Additional Pages Sustained.

56,796 Billie V. Bush v. City of Gulfport; Motion to Docket and Dismiss Appeal Sustained.

56,911 Southern Natural Gas Company v. Joseph F. Fritz, Et Al.; Motion of Appellees to Place Case on the Preference Docket and Advance Overruled.

56,924 Mississippi Employment Security Commission v. Ernest N. Sellers; Suggestion of Diminution of Record Denied.

56,986 Contoy, Inc., Et Al. v. Curtis Clay Coble; Motion of Appellee to Dismiss Appeal Sustained.

57,021 William M. Johnston v. George L. Pope; Motion to Dismiss Appeal Sustained.

57,034 Kenneth McLendon v. Caterpillar Tractor Company; Motion to Docket and Dismiss Appeal Sustained.

Misc. #1738B Ricky Don Sellers v. Circuit Court of Jones County; Petition for Writ of Mandamus Denied.

Misc. #1974A Edwin Earl Hood v. State; Petition for Writ of Certiorari to the Official Court Reporter of Copiah County, Mrs. Gwen Davis, and the Circuit Clerk of Copiah County Granted.

Misc. #2011 Audrey Nichols v. Circuit Court of Alcorn County, Petition for Writ of Mandamus Denied.

Misc. #2043 Terry R. Cooper and Earl Roy Cooper v. Roy Blane Cooper; Motion for Alimony Pending Appeal and Attorney's Fees Overruled.

Misc. #2052 Timothious St. Cloud Bird v. Harrison County Circuit Court; Petition for Writ of Mandamus Denied.

Misc. #2054 Calvin Birks v. State; Motion to Amend, Etc. Overruled.

Misc. #2055 Nathaniel Spann v. State; Motion for Leave to File an Out-of-Time Appeal Overruled without Prejudice to Its Being Filed in the Trial Court.

Misc. #2058 Laura A. Travis v. John M. Travis; Motion to Withdraw as Counsel for Appellant Sustained.

ONLY CASES MARKED "X" HAVE WRITTEN OPINIONS.

Respectfully submitted,

Sue Gordon, Clerk
Yvonne Burnham, D. C.